(3)

No. 04-1009

IN THE

Supreme Court of the United States

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its affiliated LOCAL 6000,

Petitioners,

v.

DAVID FINK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF

DANIEL W. SHERRICK
General Counsel
GEORGI-ANN BARGAMIAN
Associate General Counsel
8000 East Jefferson
Detroit, Michigan 48214
(313) 926-5216

* Counsel of Record

April 8, 2005

GEORGE B. WASHINGTON *
MIRANDA K.S. MASSIE
SCHEFF & WASHINGTON, P.C.
65 Cadillac Square
Suite 2900
Detroit, Michigan 48226
(313) 963-1921

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	3
I. THE RESPONDENTS HAVE WRONGLY ATTEMPTED TO PAPER OVER THE SPLIT IN THE LOWER COURTS OVER THE CIRCUMSTANCES IN WHICH THE GOVERNMENT MAY REQUIRE ITS EMPLOYEES TO UNDERGO RANDOM DRUG TESTS IN THE ABSENCE OF ANY EVIDENCE THAT THERE IS A SIGNIFICANT LEVEL OF DRUG USE AMONG THOSE DESIGNATED FOR TESTING	3
II. THE RESPONDENTS HAVE WRONGLY ASSERTED THAT THERE IS A SETTLED OR OBVIOUS SPECIAL NEED FOR TESTING THE POSITIONS AT ISSUE HERE	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
19 Solid Waste Department Mechanics v. City of Albuquerque, 156 F. 3d 1068 (10th Cir. 1998)	4, 6
American Federation of Gov't Employees v. Roberts, 9 F. 3d 1464 (9th Cir. 1993)	8
Aubrey v. School Board of Lafayette Parish, 148 F. 3d 559 (5th Cir. 1998)	4, 6
Board of Education v. Earls, 536 U.S. 822 (2002)	4, 5, 7
Chandler v. Miller, 520 U.S. 305 (1997)	4, 6, 7, 8
International Union, UAW v. Winters, 385 F.3d 1003 (6th Cir. 2004), *pet. for cert. pending* Sup. Ct. No. 04-1009	4, 5, 7
Knox County Education Association v. Knox County Board of Education, 158 F. 3d 361 (6th Cir. 1998), *cert. den.* 528 U.S. 812 (1999)	4
National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)	4, 5, 6, 7, 8
Peterson v. City of Mesa, 207 Ariz. 35, 83 P. 3d 35 (2004), *cert. den.* ___U.S.___, 125 S. Ct. 51 (2004)	4, 5
Taylor v. O'Grady, 888 F 2d 1189 (7th Cir. 1989)	8
United Teachers v. School Bd through Holmes, 142 F. 3d 853 (5th Cir. 1998)	4, 6, 7

IN THE

Supreme Court of the United States

No. 04-1009

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its affiliated LOCAL 6000,

Petitioners,

v.

DAVID FINK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

STATEMENT OF THE CASE

The Respondents are now requiring more than one fourth of the 61,000 employees of the State of Michigan to submit to random urine tests for drugs and alcohol as a condition of their continued employment (Resp. Br., 17). As the Sixth Circuit found, however, there is no evidence of a significant level of drug use by the State's civil servants or of any significant work problems actually arising from such use (Pet, 13a).

For purposes of opposing this petition, however, the State Respondents have attempted to obscure those facts by asserting that there have been "instances" where probation officers have tested positive for drugs and other instances where em-

ployees were found in possession of drugs on the grounds of the State prisons or community health facilities (Resp. Br., 8, 12). But the State has stipulated that those instances are extremely rare. For the professional and clerical employees represented by the UAW, the State stipulated that:

> 140. In the last ten years, no employee represented by the UAW has been accused of smuggling controlled substances to any prisoner in the Michigan correctional facilities.
>
> 141. In the last ten years, one employee represented by the UAW has been found in possession of controlled substances within the Michigan correctional facilities.
>
> (Amend. Stip., paras 140-141, Ct App Jt Apx, 119).

Similarly, for health-care employees in the UAW units, the State stipulated that:

> 158. Before February 12, 2001, no employee represented by the UAW in any position designated for testing under Category 3 [delivery of health care services] has ever been accused of delivering health care services while impaired due to drug or alcohol use. On February 12, 2001, an incumbent in a Registered Nurse position in Kalamazoo Psychiatric Hospital tested positive for marijuana use following a random drug screen.
>
> (Amend Stip., para 158, Ct App Jt Apx, 122).

More generally, the State stipulated that in the 39,000 drug tests that it conducted, .8 percent of employees tested positive for marijuana and .17 percent tested positive for any other substance (Amend Stip., paras 26-30, Ct App Jt Apx, 91-92).

The State respondents, however, assert that the tests should be sustained because there remains some risk, however slight, that a drug-impaired employee could cause harm in the future. For Customs Agents, air traffic controllers, pilots and similar jobs where a single error could have grave conse-

quences, this Court and the lower courts have upheld testing on such a basis. But for the broad range of jobs where the harm that could be caused by an error is much lower, the lower courts have split over whether random testing may be sustained on the basis offered here.

The question at issue here is whether a far broader class of employees, comprising in this case over a fourth of the workforce of the State of Michigan,[1] may be required to undergo repeated random tests based on harms that can be envisioned but that have not in fact occurred.

REASONS FOR GRANTING THE WRIT

I. THE RESPONDENTS HAVE WRONGLY ATTEMPTED TO PAPER OVER THE SPLIT IN THE LOWER COURTS OVER THE CIRCUMSTANCES IN WHICH THE GOVERNMENT MAY REQUIRE ITS EMPLOYEES TO UNDERGO RANDOM DRUG TESTS IN THE ABSENCE OF ANY EVIDENCE THAT THERE IS A SIGNIFICANT LEVEL OF DRUG USE AMONG THOSE DESIGNATED FOR TESTING.

In repeated decisions, the state supreme courts and the federal courts of appeals have found that there was little evidence of drug use by public employees upon whom the

---

[1] The Respondents attempt to style this a facial challenge because the Petitioner stipulated that the particular jobs at issue fell within one or more of the categories that the State had designated for testing. (Resp. Br., 15-16). From the beginning, however, the Petitioner challenged the testing program as it applied to the *job classifications* at issue in this case. Indeed, the parties attached the classification specifications and entered into extended stipulations on the numbers of employees in the classifications in various work sites and the experience of drug use that existed in the various classifications. As both the Sixth Circuit and the district court understood that the UAW challenged the State's program as it applied to these particular classifications, the State's claim that this case presents a facial challenge has no basis at all.

government had imposed random drug testing. *Peterson v City of Mesa*, 207 Ariz 35, 39, 83 P. 3d 35 (2004), *cert. den.* ___U.S.___, 125 S. Ct. 51 (2004)(firefighters); *United Teachers v School Bd through Holmes*, 142 F. 3d 853, 856 (5th Cir. 1998)(teachers); *19 Solid Waste Department Mechanics v City of Albquerque*, 156 F. 3d 1068, 1074 (10th Cir. 1998) (mechanics); *Knox County Education Association v Knox County Board of Education*, 158 F. 3d 361, 374 (6th Cir. 1998), *cert. den.* 528 U.S. 812 (1999)(teachers); *Aubrey v School Board of Lafayette Parish*, 148 F. 3d 559, 563 (5th Cir. 1998)(custodians); *International Union, UAW v Winters* (Pet App, 1a-16a)(civil servants).

After agreeing on those factual findings, however, the courts have split dramatically over whether the government may force such employees to submit to random drug tests. In the absence of evidence of a work-related drug problem, appellate courts have struck down the random testing of firefighters in Arizona, *Peterson*, of teachers in Louisiana, *United Teachers*, and of mechanics in New Mexico, *19 Solid Waste Mechanics*. On essentially identical factual records, however, other appellate courts have sustained the random testing of teachers in Tennessee, *Knox County*, school custodians in Louisiana, *Aubrey*, and, now, civil servants in Michigan, *International Union, UAW*.

The Respondents attempt to attribute this split to claimed factual differences between the cases (Resp. Br., at 27-29). But a mere listing of the job classifications reveals that the jobs at issue are similar in their duties, in the degree of supervision, and in the risk of harm that they pose. Moreover, even a brief review of the actual decisions demonstrates that the appellate courts have split over the law—and in particular over their understanding of this Court's decisions in *National Treasury Employees Union v Von Raab*, 489 U.S. 656 (1989), *Chandler v Miller*, 520 U.S. 305 (1997), and *Board of Education v Earls*, 536 U.S. 822 (2002).

The Respondents, for example, claim that the Supreme Court of Arizona in *Peterson* and the Sixth Circuit in this case reached different results because firefighters have more supervision, do not carry firearms, do not participate in the interdiction of drug shipments, and do not work in a "highly regulated industry or profession" (Resp. Br., at 27). But those asserted distinctions do not exist: the professional and clerical employees working in the Michigan's hospitals and prisons have *more* supervision than firefighters; they, too, do not carry firearms; with the partial exception of parole and probation officers, they have no greater role in interdicting illegal drugs than do firefighters; and their professions are no more regulated than those of firefighters.

More fundamentally, the opinions of the Supreme Court of Arizona and of the Sixth Circuit make clear that they differ not over the facts—but over the law. Thus, the Supreme Court of Arizona held that *Von Raab* had to be read in its "unique context" of Customs Agents, while the Sixth Circuit explicitly held that *Von Raab* applied to many "unique" contexts. Compare *Petersen*, 82 P.3d at 40, with *International Union, UAW* (Pet Apx, 12-13a). Similarly, the Supreme Court of Arizona held that *Earls* provided only "limited support" for the random testing of firefighters because they had "little in common with students entrusted to the government's care," *Peterson*, 82 P 3d at 40. The Sixth Circuit, however, cited *Earls* repeatedly in support of the broad proposition that "the need to deter and prevent a substantial harm provides the necessary immediacy for the imposition of a drug testing program." *International Union, UAW*, Pet 12-13a.

The Respondents' attempts to conceal the legal differences that split the Fifth Circuit are similarly unavailing. Even though the conflict is obvious, the Respondents assert that there is no conflict between an August 1998 panel decision upholding the random testing of school custodians and a May

1998 panel decision striking down the random testing of teachers, because, say the Respondents, in the three months between May and August 1998 the Fifth Circuit discovered a special need for protecting children in the public schools (Resp. Br., at 28-29, citing *Aubrey, supra,* and *United Teachers, supra.*).

But both *United Teachers* and *Aubrey* explicitly recognized that there was a special need to protect school children. The *United Teachers* panel, however, held that a school district could *not* establish that drug testing was required to address that need without proof of an "identified problem in drug use by teachers." The *Aubrey* panel, however, held that a school district *could* establish that drug testing was required to address the same proffered special need in the absence of any evidence of drug use by custodians. Compare *United Teachers*, 142 F. 3d at 857, with *Aubrey*, 148 F. 3d at 563-564. As Judge Dennis demonstrated in dissent, the two Fifth Circuit panels had sharply divergent understandings of this Court's decisions in *Von Raab* and *Chandler*. *Aubrey*, 142 F. 3d at 570-571 (Dennis, J, dissenting).

The same split is evident in the Tenth Circuit's decision in *19 Solid Waste Mechanics*. Even though the Respondents correctly observe that all of the judges in that case agreed that random tests could sometimes be justified in the absence of proof of a preexisting drug problem (Resp. Br., at 29), they ignore the sharp disagreement between the judges over the circumstances in which that could be done. Writing for the majority, Judge Tacha read *Von Raab* and *Chandler* broadly, declaring that they allowed the government to impose random tests on mechanics even in the absence of a "documented drug problem among mechanics." *Id.*, 156 F. 3d at 1074. In dissent, however, Judge Briscoe held that *Chandler* required that *Von Raab* be read "in its unique context" and that random tests could not be imposed upon mechanics ". . . in the

absence of a demonstrated problem of drug abuse." *Id.*, 156 F. 3d at 1075.

In fact, the Respondents' own brief—and in particular its expansive reading of *Earls*—makes clear the need for a definitive decision by this Court. In *Earls*, both Justice Thomas and Justice Breyer stated that this Court upheld the program at issue *because* it was a (1) voluntary, (2) non-disciplinary program for (3) testing high-school students—a group for whom the state had in loco parentis responsibilities and among whom there was national evidence of high levels of drug use, including high levels of the use of "hard" drugs. *Earls*, 536 U.S. at 830, 833-834, 839-843. The Sixth Circuit disregarded all three of these *explicit* limitations (*International Union, UAW*, Pet 13a, citing *Earls*, 536 U.S. at 836). The Respondents now go even further by asserting that in general the government need not wait for "a major accident" or "evidence of massive drug use" before subjecting one fourth of its employees to random testing (Resp. Br., 23, citing *Earls*, 536 U.S. at 836).

The issue is one that must be resolved. If, as the Sixth Circuit held and the Respondents contend, the State "need not wait" if it can imagine a harm that a drug-impaired employee could cause, then drug testing can expand from a quarter to a half of State employees—and to many professionals whose jobs are regulated by the State. If, on the other hand, the Supreme Court of Arizona, the *United Teachers* panel, and Judge Briscoe correctly understood this Court's precedents, then the State cannot expand the testing to far broader categories of employees without evidence that there is an actual problem of drug abuse among those employees.

As millions of public employees—and more millions of professionals regulated by the State—work where there is no significant drug problem, the question at issue is of obvious importance. Moreover, as the government is "the potent, Omnipresent teacher," the issue is important even beyond the

realm of those working for or regulated by the government. See *Chandler*, 520 U.S. at 322, quoting *Olmstead v United States*, 277 U.S. 438, 485 (1928)(Brandeis, J, dissenting).

II. THE RESPONDENTS HAVE WRONGLY ASSERTED THAT THERE IS A SETTLED OR OBVIOUS SPECIAL NEED FOR TESTING THE POSITIONS AT ISSUE HERE.

The bulk of Respondents' Brief is devoted to establishing the purported need for testing the employees at issue—and a claimed consensus in favor of that testing. While much of that discussion is irrelevant at this time, four points are essential.

First, there is no consensus in the lower courts that the positions at issue here should be subject to testing (Resp. Br., 19-23). As to the counselors, psychologists and social workers in the State hospitals—and the probation and parole officers in the State correctional system—the State has cited *no* decision from *any* jurisdiction in the country upholding the testing of such persons. Even as to the employees who work inside the prisons, the precedent cited by the State is decidedly split: the Seventh Circuit has approved the testing of all employees who have contact with the inmates, but the Ninth Circuit has upheld testing only of correctional officers and stated that even there, "the call was close" even before this Court's limitation of *Von Raab* in *Chandler*. See *Taylor v O'Grady*, 888 F 2d 1189 (7th Cir 1989); *American Federation of Government Employees v Roberts*, 9 F. 3d 1464, 1468 (9th Cir. 1993).

Second, despite the Respondents' suggestions to the contrary, the fact that the employees at issue concededly work in jobs where privacy is already diminished does not by itself establish a special need for the testing (Resp. Br., 19-20). In fact, it may establish the reverse. Thus, for example, while the State clearly has an interest in stopping the importation of

unlawful drugs into the prisons, the unrelenting scrutiny and repeated searches of prison employees already provides near draconian means to detect and deter that trade. Indeed, if an employee is willing to brave repeated searches, constant scrutiny, and long prison terms in order to import drugs into the prison, an occasional drug screen will obviously provide little, if any, additional deterrent, even for those would-be importers who happen to use drugs themselves.

Third, despite the Respondents' suggestions to the contrary (Resp's Br, 6-7), the fact that the probation, parole, and prison employees work with clients who have high rates of past or present drug use is *not* grounds for testing those employees. As this Court should make clear, a special need—like guilt—may not be established by association.

Fourth, the mere invocation of the possibility of shakedowns does not establish a special need for drug testing (Resp's Br, 7). In fact, it establishes the need for the searching analysis that this Court commanded in *Chandler* and that is so noticeably absent in the lower court opinions in this case. Of course, *if* a prisoner, parolee, or probationer *happened* by *some means* to discover that an employee was engaged in some illegal activity in his *off-duty* time, that *might* lead to a shakedown by *some* of those offenders. But the qualifiers indicate how rare that contingency is in theory—and the data indicate that it is to date unknown in Michigan.

The fact is that the public officials who order drug tests can envision limitless ways in which drug use on the job might cause harm and can claim that drug testing may deter some of those harms. The question is whether and under what circumstances the incremental deterrent of those imagined harms is sufficient to impose random searches on thousands of innocent employees.

The Petitioners ask this Court to resolve that question.

CONCLUSION

For the reasons stated, the petitioners request that this Court grant the writ of certiorari to the Sixth Circuit.

Respectfully submitted,

DANIEL W. SHERRICK
General Counsel
GEORGI-ANN BARGAMIAN
Associate General Counsel
8000 East Jefferson
Detroit, Michigan 48214
(313) 926-5216

GEORGE B. WASHINGTON *
MIRANDA K.S. MASSIE
SCHEFF & WASHINGTON, P.C.
65 Cadillac Square
Suite 2900
Detroit, Michigan 48226
(313) 963-1921

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

* Counsel of Record

April 8, 2005